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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1334

MILTON SILVERMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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April, 1971

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PETITIONER'S REPLY MEMORANDUM

Several comments are appropriate in response to the Brief for the United States in Opposition:

1. The Solicitor General's Brief Misconceives the Nature and Importance of the Departure From the Attorney-Client Privilege

Quite incorrectly, the Solicitor General's brief (Opp. Br. 8-9) ascribes to petitioner "the anomalous doctrine that documents which are not privileged when in the hands of the client somehow became clothed with immunity when turned over to an attorney." Petitioner proposes no such doctrine. What petitioner does say is that the confidential comments and con-

clusions of the attorney respecting the union minutes—as well as the knowledge acquired by the attorney as a result of his conferences with his client—are clothed with the attorney-client privilege. To force disclosure of those comments, conclusions and such knowledge is to drive a dangerous wedge into the privilege and to create an ominous precedent boding ill to the confidential relationships between all attorneys and all clients.

The Solicitor General, of course, does not deny the appropriateness of granting certiorari, in the exercise of this Court's administration of criminal justice in the federal courts, to review and correct an unwarranted invasion of the established attorney-client privilege. Precisely that type of invasion occurred in this case. The nub of the invasion lay in the forced revelation of the portion of attorney Friedland's confidential communication to his client that stated that "[t]here is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board." * In an attempt to justify that invasion, the courts below reasoned that this confidential statement or observation of the attorney merely described the absence of any "approval of this loan" in the Executive Board minutes; and those minutes were said by the courts below to be "public records" under the Landrum-Griffin Act, though they are now

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* This statement from Friedland's confidential communication was used to refresh his recollection that the original version of the minutes contained no specific authorization for the loan in question. Such testimony was critical to the Government's proof under Counts 10-13 that unauthorized loans and payments had been made to petitioner Silverman. Oddly enough, the Government made no attempt to prove this lack of authority by other means, such as through cross-examination of the petitioner.

described by the Solicitor General as merely being "nonconfidential" in nature (Opp. Br. 8). Hence, it is said, such a physical description of the "nonconfidential" minutes as they were presented to the attorney could not constitute a "disclosure of any confidential communication from the report nor any disclosure of any advice from Mr. Friedland to a client" (Opp. Br. 8).

But it does not follow that any observation, description or conclusion respecting such "nonconfidential" minutes, drawn by the attorney in the course of a confidential communication to his client, partakes of the "nonconfidential" character of the subject of that observation, description or conclusion. To search for, segregate out and permit disclosure of such a descriptive passage in the attorney's report, as distinguished from some other form of "confidential communication" or "any advice . . . to a client" (Opp. Br. 8) in that report, is to indulge in precisely the type of fishing expedition midst the attorney's confidential communications to his client that the privilege was designed to outlaw. It is both impossible and dangerous to attempt to differentiate, in terms of confidentiality, between the descriptive and the advisory in the lawyer's opinion letter to his client. Even the most seemingly descriptive passages reflect upon communications made by the client and may have a confidential and advisory purpose or may reflect a legal conclusion or analysis respecting otherwise "nonconfidential" material.*

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* Indeed, it is highly possible that Friedland's statement that no "authorization" of the loan appeared in the minutes was directed to the regularity of the procedure followed in adopting petitioner's report to the union board rather than the presence or absence of any specific language in the board minutes.

It need only be added that the forced disclosure of this confidential communication from the attorney came about when the prosecutor, in his protracted attempt to invade the area of confidential communications created an aura of criminality which diverted the minds of the jurors from the true issues, caused the jurors to conclude that testimony which tended to exonerate the petitioner actually implicated him and caused the jurors to conclude that the claim of privilege was nothing more than a subterfuge designed to shield the petitioner from the sword of justice. The impact of the invasion of the privilege was plainly prejudicial and can only be described as resulting in a stain on the reputation of the federal courts for dispensing fair criminal justice. Only this Court can correct the egregious error.

2. The Solicitor General's Brief Confirms the Invalidity of the Indictment in Its Omission of an Essential Element of the Crime Charged

The Solicitor General does not attempt to argue that the indictment in this case specifically alleged in Counts 9 through 13 that petitioner had embezzled the funds of a labor organization "engaged in an industry affecting commerce." The Solicitor General in fact concedes that this necessary element of the crime was charged only by implication (Opp. Br. 10). This process of indicting by implication rather than by specific, clear and unambiguous language was rejected by this Court in *United States* v. *Hess,* 124 U.S. 483 (1888), and *United States* v. *Carll,* 105 U.S. 611 (1881).

The Solicitor General attempts to ignore the impact of those decisions in this case simply by stating that

Carll was a forgery case and then summarizing the particular defect in the indictment in that case. Obviously the facts in *Carll* differed from the facts in the instant case, but that does not make the holding of that case inapplicable.* As set forth more fully in the petition (Pet. 17-22) indictment by implication is impermissable in our judicial system.

3. The Solicitor General Misconstrues the Court of Appeals' Opinion and Thereby Fails To Refute Petitioner's Contention That He Was Required To Prove His Innocence

The Solicitor General contends that the Government met its burden of proof in this case when "it show[ed] a wrongful receipt of money belonging to [the union]. It [did] not have the burden of showing what the [petitioner] did with the money after he took it" (Opp. Br. 11).**

In the Court of Appeals one judge (Moore, C. J.) concluded that the Government could prove embezzlement by showing "either a lack of bona fide authorization or an absence of benefit to the labor organization

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* The Solicitor General's attempted distinction of *Walker* v. *United States*, 342 F.2d 22 (5th Cir.) cert. denied 382 U.S. 859 (1965), is similarly defective.

** In support the Solicitor General cites *Doyle* v. *United States*, 318 F.2d 419 (8th Cir. 1963). In that case a union clerk was convicted of embezzling dues she had received from union members and appropriated to her own use. The defendant contended the Government was required to show an increase in her net worth or other evidence that she had in fact used the funds for her own benefit. The defendant there had no authority to deal with the funds of the union in a general fashion. Rather her job was simply to receive dues for the union account. In contrast the petitioner in this case was an important officer of the union involved and was authorized to deal generally with union funds.

from the expenditures" (Pet. 18a). For purposes of considering the sufficiency of the evidence on Counts 1 through 8, the other members of the panel (Friendly, Hays C. JJ.) accepted *arguendo* the validity of this construction of the statute. However, they questioned strongly this construction (Pet. 38a) and in fact necessarily rejected it with respect to the other counts by concluding that the Government was obliged to show that the petitioner had taken the union's money "knowing that the [union] would not have wanted that to be done" (Pet. 37a-38a). This construction by the majority of the court below necessarily required the *Government*—not the defendant—to show what happened to the funds in question.

The Solicitor General misconstrues the relationship of *In re Winship,* 397 U.S. 358 (1970) to this case. Petitioner does not contend that that case requires the Court of Appeals to apply the "reasonable doubt" standard as the Solicitor General erroneously states (Opp. Br. 11). Rather petitioner's contention is that the Court of Appeals' construction of the statute and its conclusion that the evidence in this case was sufficient to support a conviction under that construction has effectively shifted the burden of proof to the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58(2), petitioner files this petition for rehearing addressed to the order of this Court, entered on May 3, 1971, denying the petition for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this proceeding. As grounds for this rehearing request, petitioner states as follows:

1. The Grant of Certiorari in the Caldwell Case Makes Appropriate the Grant of Review in This Case.

On May 3, 1971, the day on which this Court denied the petition for certiorari in this case, certiorari was granted in No. 1114, *United States* v. *Caldwell*. In *Caldwell* the Court will be reviewing the Ninth Circuit's determination that a newspaper reporter has a privilege not to reveal confidential sources of news information, a privilege with First Amendment overtones so as to permit an invasion only upon the demonstration of "a compelling need." 434 F.2d 1081 at 1089.

While the instant case involves an examination of the scope and content of the attorney-client privilege, some of the same basic considerations of federal law enforcement policy are involved as will be before this Court when it considers the newspaper reporter's privilege in *Caldwell*. There are, of course, both similarities and dissimilarities between the two privileges; and the reporter's privilege touches upon First Amendment freedoms whereas the attorney-client privilege furthers the purposes of the Sixth Amendment. But the distinctions that exist between the two privileges will most certainly play a role in the dialogue that will occur before this Court in *Caldwell* and will serve to cast helpful light on the boundaries and the implications of the reporter's privilege.

The Ninth Circuit's opinion in *Caldwell* reveals some of the interrelationships between the two privileges. Speaking of the basic nature of the reporter's privilege, the court noted that "[u]nlike the relation between an attorney and his client or a physician and his patient, the relationships between journalists and news sources . . . are not rooted in any service the journalist can provide his informant apart from the publication of the

information so obtained." 434 F.2d at 1088. And the Ninth Circuit, holding that the reporter's privilege depends upon the informant's continuing trust and confidence that the handling of his confidences has been discreet, felt that calling a reporter to testify behind closed doors as to such confidences creates fear and uncertainty in the informant's mind and leads to a loss of communication between informant and reporter—a "human reaction as reasonable to expect as that a client will leave a lawyer when his confidence is shaken." 434 F.2d at 1088.

The conceptual similarity of the two privileges, as well as their differences, amply justifies a reconsideration of the denial of certiorari in this case. Indeed, it would be quite appropriate for the Court to hear and consider the instant case at the time it accords plenary review of the *Caldwell* ruling. The relationships and the differences between the two privileges deserve full exploration by this Court. This exploration is appropriate, particularly since modern sophisticated surveillance techniques permit more ready invasion of these important inter-personal privileges.

2. The Second Circuit's Error in Creating a Dangerous Exception to the Attorney-Client Privilege Was Exacerbated by That Court's Failure To Effectuate Deletion of a Portion of Its Opinion Dealing With This Point.

In its *per curiam* opinion accompanying the denial of the petition for rehearing the Second Circuit ordered that one full paragraph of its opinion dealing with the attorney-client privilege be deleted. The purpose of that deletion was "[t]o avoid any . . . impression . . . that our opinion makes an exception to the attorney-client confidential communication rules." (Pet. 42a).

Unfortunately, the Second Circuit has not taken adequate steps to avoid the undesirable impression created by its opinion. Since the filing of the petition in this Court the opinion has been reported in the bound volume of 430 F.2d without any indication that the objectionable paragraph has been ordered deleted.

The critical significance of the "deleted" paragraph lies in its statement, which follows several references to Wigmore's classic treatise on evidence, that "The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney." (Pet. 28a; 430 F.2d at 122). That notion that an attorney's comment or advice to a client is privileged only to the extent that it reflects or reveals a confidential communication from the client permeates the entire attitude of the Second Circuit, as well as of the Solicitor General, as to the basic nature of the attorney-client privilege. It is a notion that is legally and historically unwarranted and is flatly contradicted by Wigmore, on whom the Second Circuit purported to place great reliance. The "deleted" paragraph simply made express what was implicitly wrong with the remainder of the court's discussion of the privilege.

In the instant case, the client gave his attorney preexisting and non-privileged union minutes and sought his advice as to their legal adequacy; the attorney responded in critical part by stating that the minutes contained "no approval of this loan by the Executive Board." Under the Second Circuit's restrictive view, that statement by the attorney was not privileged since it did not reveal any confidential communication from

the client, but simply described the condition of the non-privileged minutes.

But Wigmore makes plain that this statement falls squarely within the accepted and traditional formulation of the privilege. "Where the document already had an independent existence and the communication consists of bringing its contents to *the attorney's knowledge,* that *knowledge* is not to be disclosed by his testimony." 8 Wigmore, Evidence § 2307, p. 594 (original emphasis, McNaughton rev. 1961). As further stated in § 2308, pp. 595-596:

> "The client's disclosure to the attorney of the contents of a pre-existing document will almost always be an act of communication (§ 2306 *supra*)— i.e., a part of the matters voluntarily committed to the notice of the attorney. It is impossible, in the language of Mr. Justice Bronson, to perceive 'any solid distinction between the oral statement of a fact to counsel and a communication of the same fact by delivering to him a deed or other written instrument.' Unless, therefore, a particular communication of this sort is not confidential [because it was not communicated in confidence], it is within the privilege, and the testimony of the attorney on the stand cannot be required. Nor does it here make any difference that the client would have been compellable to produce the deed in chancery or otherwise, for he is also compellable to tell what he knows on other subjects, and yet his communications about them, made to the attorney, are privileged. The communication of the document is distinct from the document itself."

In other words, an attorney's *knowledge* about the contents of a document submitted to him by a client, be that document privileged or non-privileged, cannot be